TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~302.~~ 77

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

EMIL HEROLD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 7, 1876.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

John Lenehan, being duly sworn, says that on the 16 day of October, 1876, he served the within writ of error on Stanley, Brown and Clark, esqs., def't's attorneys, by leaving a copy thereof with the person in charge of the law office of said defendant's attorneys, No. 16 Wall street.

JOHN LENEHAN.

Sworn to before me this 16 day of Oct., 1876.

J. H. FITCH,
Notary Public.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Emil Herold and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said Chester A. Arthur, defendant, as by his complain't appear: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of October term, eighteen hundred and seventy-six, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

ALEX. S. JOHNSON, *Cir. J.*

3 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obediance thereto, do hereby certify that the following pages, numbered from one to thirty-one inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Emil Herold, defendant in error, against Chester A. Arthur, plaintiff in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) S. B. & C. U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Emil Herold, defendant in error. Writ of error. Filed Oct. 17, 1876.

4 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of October, 1875, to wit, of the 12th day of October, in the year of our Lord one thousand eight hundred and seventy-five.

Witness the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the 6th day of January, 1876, in October term, A. D. 1875, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came Emil Herold, by Stanley, Brown & Clarke, his attorneys, and brought into the said court, before the aforesaid judges thereof, then there, his certain declaration against Chester A. Arthur, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

5 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, of the October term in the year one thousand eight hundred and seventy-five.

EMIL HEROLD
vs.
CHESTER A. ARTHUR.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Emil Herold, plaintiff in this suit, come into court, and by Stanley, Brown & Clarke, *their* attorneys, give the court now here to be informed that heretofore, to wit, on the eighth day of August, one thousand eight hundred and seventy-four, this action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court, in favor of the said plaintiffs, against the defendant herein, upon the causes of action hereinafter set forth, and the summons therein filed with the clerk of said court. That the defendant afterwards, by his attorney, George Bliss, esquire, duly appeared in said action, and thereupon, on the fifth day of December, in the year one thousand eight hundred and seventy-four, the said action was duly removed by writ of certiorari for further prosecution in this court, according to the act of Congress in such case made and provided; and the clerk of the said court did thereupon return the said writ with the said summons, and duly file the same in this court, which allegations the defendant admits to be true.

Wherefore, let the further proceedings and trial in this action be continued in this court.

And the said plaintiff, by his said attorneys, complains of said defendant of a plea of trespass on the case for promises, for that, whereas, said defendant, on the 8th day of August, eighteen hundred and seventy-four, at New York City, in the district aforesaid, was indebted to said plaintiffs in the sum of six hundred and nineteen and $\frac{80}{100}$ dollars, lawful money of the United States of America, for duties on merchandise, to wit, ground chiccory, packed in papers, imported into and entered at the collection district of the United States for the city of New York, on or about the 6th day of May, A. D. 1873, in the year one thousand eight hundred and seventy-three, in the following vessels, to wit: America, from Bremen, unlawfully demanded, exacted, and received, at said New York City, by the said defendant, then collector of the customs for said district, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest and appeal in writing in due form of law, & as appears by the bill of particulars herein.

And being so indebted he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiff in the further sum of one thousand *thousand* dollars, lawful money of the United States of America, for money before that time lent and advanced by said plaintiff to said defendant, and at the special instance and request of the said defendant. And for other money by the said plaintiffs before that time paid, laid out and expended for the said defendant, and at the like request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this count mentioned, when he should be thereunto afterwards requested.

Nevertheless, said defendant (although often afterwards requested so to do) has not paid said sums of money, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same or any part thereof to the said plaintiff has hitherto refused and still does refuse, to the damage of the said plaintiff of two thousand dollars, and therefore the said plaintiff brings suit, &c.

6 *Plea.*

United States circuit court, southern district of New York.

CHESTER A. ARTHUR }
ad's. }
EMIL HEROLD. }

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff in this suit hath above thereof declared against the said defend-

ant, and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

7 Therefore the issue above joined is ordered by the said court to be tried at the circuit court appointed to be held at the United States court rooms, in the city of New York, in and for the district aforesaid, on the 3rd Monday of October, 1875.

And now at this day, to wit, the 13th day of January, 1876, before the said judges of the said circuit court, at the U. S. court-rooms in the city of New York, come the said plaintiff, by his attorneys aforesaid, and Nathaniel Shipman, esquire, district judge of the United States, for the district of Connecticut, in the second circuit, sitting as circuit judge, according to the statute in such case made and provided, before whom the said issue was tried, hath sent hither his record had before him, in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before Nathaniel Shipman, esquire, district judge of the United States for the district of Connecticut, in the second circuit within named, according to the form of the statute in such case made and

8 provided, come as well the within named plaintiff, by Stanley, Brown & Clarke, his attorneys, as the within named defendant, by George Bliss, his attorney, and the jurors of the jury summoned to try the said issue being called, also come, who to speak the truth of the matter within contained being chosen, tried and sworn, say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiff has within complained against him; and they assess the damages of the said plaintiff, by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, to six hundred and nineteen $\frac{80}{100}$ dollars in gold coin of the United States as principal, and seventy-one dollars and forty-three cents in currency as interest, and for their costs and charges to six cents.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages, costs and charges by the jurors

9 aforesaid, in form aforesaid, assessed, and also fifty-eight dollars and eighty-five cents for his said costs and charges by the said court now here adjudged of increase to the said plaintiff, and with his assent, and also the further sum of thirty-six dollars and twenty-nine cents interest on the said verdict from January 13, 1876, in addition to said costs, which said damages, costs, and charges, and interest amount in the whole to six hundred and nineteen dollars and eighty cents in gold coin, and one hundred and sixty-six dollars and fifty-seven cents in currency.

And said defendant in mercy, &c.

Judgment signed this 21st day of October, 1876, as of the 7th day of Oct., 1876.

J. M. DEUEL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. Emil Herold, plaintiff, against

10 Chester A. Arthur, defendant. Judgment record. Stanley, Brown & Clarke, attorneys for plaintiff, 16 Wall street, New York. Filed this 21st day of Oct., 1876, nunc pro tunc, as of Oct. 7th, 1876.

11 *Bill of exceptions.*

United States circuit court.

EMIL HEROLD
ag'st
CHESTER A. ARTHUR.

Be it remembered that afterwards, to wit, on the 12th & 13th day of January, 1876, at a stated term of the United States circuit court, held in the City of New York, namely, at the October term, 1875, before the honorable Nathaniel Shipman, district judge, sitting as circuit judge, the issues joined in this action came on to be tried, and were tried before a jury duly empanelled and sworn, the said plaintiffs being represented by S. G. Clarke, esq., and Edward Hartley, esq., their counsel, and the defendant by H. E. Tremain, esq. And in the course of the said trial the defendant did take and allege sundry exceptions to the ruling and charges of the court, and to the refusal of the court to give cer-
12 tain instructions to the jury, as then and there prayed for, which said several rulings and exceptions are hereinafter set forth.

To maintain the said issues on the part of the plaintiffs, counsel for the said plaintiffs produced evidence showing the importations by the plaintiffs from a foreign port into the port of New York, in the year 1873, of certain merchandise, upon which a duty had been assessed by the defendant, as collector of the port of New York, at the rate of five cents per pound, under section 11 of the act of Congress entitled "An act to increase the duty on imports, and for other purposes," approved January 30th, 1864, which provides a duty "on chicory root, four cents per pound; ground, burnt, or prepared, five cents per pound"; and upon the ascertainment and liquidation of said duties the plaintiffs duly protested and appealed to the Secretary of the Treasury, and brought this action in due season, pursuant to the requirements of the statute in such case made and provided, claiming that the said merchandise was dutiable only at the rate of one cent per pound, by virtue of section
13 1 of the act of Congress entitled "An act to reduce the duties on imports and to reduce internal taxes, and for other purposes," approved June 6th, 1872, which provides a duty in lieu of former duties "on chicory root, ground or unground, one cent per pound."

The testimony which was offered by the plaintiff tended to show that the article in question was commercially known as "finely ground chicory, in papers," or "paper chicory," and was pulverized chicory; that chicory is grown extensively in Germany, where it is largely used as a substitute for coffee. The root, when dug from the ground, is first washed and scraped, then split and cut by machinery into pieces or sections, which are partially dried in the sun and then kiln-dried, in which latter condition it becomes an article of commerce to this country. Of this there are two forms, "light kiln-dried" and "extra kiln-dried," neither of which are burnt or roasted, except such as is necessarily incident to the process of kiln-drying.

The next process is burning or roasting, which is done in heated cylinders. It is necessarily roasted before it can be ground. Then
14 it is ground in mills, from which it emerges in coarse and fine particles commingled, in which condition, or when simply burnt or roasted, it is not an article of commerce. The chicory is then passed through sieves, by which the coarse and fine particles are separated from each other. The coarse particles are packed in barrels or casks

for shipment, and is called in trade "coarsely ground" or "granulated chicory"; the finer particles, after being again ground and reduced to powder, are packed in small paper bags, weighing ordinarily one-quarter of a pound each, sometimes half a pound, which are packed in casks. This kind is called "finely ground chicory, in papers," or "paper chicory." Both forms are drier than the atmosphere, and absorb moisture from it; the first more slowly than the second, because the particles are larger.

The casks, or paper packages, of "paper chicory," are placed in damp cellars or vaults attached to and a part of the large chicory manufactories, some of which are exclusively for the manufacture of paper chicory, in order to hasten the absorption of moisture, and in some factories the hastening of absorption is further facilitated by allowing steam to escape into the cellars. The greater quantity of moisture in finely ground chicory over that which is absorbed in the "granulated," makes the paper chicory from 15 to 30 per cent. less per pound than the "granulated."

Paper chicory, when taken out of the cellars, has the consistency of paste and hardens as it is exposed to the air. The granulated chicory also hardens by exposure.

The granulated chicory is usually sold by importers in this country to coffee dealers and coffee roasters to adulterate coffee; the paper chicory is sold exclusively to consumers, mostly Germans and Scandinavians in the Western States, who use it as a substitute for coffee.

The defendant introduced evidence to show that the natural absorption of moisture was hastened by artificial means; i. g., by steam introduced through pipes in the vaults or cellars, and that this operation was an essential and usual process in the preparation of the paper chicory.

16 On the part of the plaintiff, evidence was offered that nothing had been done to the chicory in these vaults, except to allow the natural absorption of moisture to take place by exposing the paper chicory to the air. Some of the witnesses testified that paper chicory had different traits as to taste and smell from granulated chicory.

The plaintiffs gave some evidence to show that a different article from the imported article called "patent chicory" or "chicory coffee" was made by an admixture of water and foreign ingredients. It was not claimed that the plaintiff's goods contained any admixture of foreign ingredients.

At the close of the testimony introduced by the plaintiff, when the plaintiff had rested his case, and also again at the close of all the testimony adduced, and when both sides had completed their evidence, the defendant moved that the court direct the jury to find a verdict for the defendant, which motion the court each time denied, and defendant's counsel duly excepted.

17 The court then charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff in the year 1873 imported 42 casks of paper chicory into this market. Paper chicory is an article, a number of samples of which have been presented before you, which you have examined more carefully than I have, and which, therefore, it is unnecessary for me to describe. The collector imposed a duty upon this article of five cents a pound. The plaintiff claims that a duty of one cent per pound only was applicable to this article, under the then existing statutes, and, having paid the extra duty which was demanded, has brought a suit to recover from the collector the amount which he claims was exacted contrary to law. The question, therefore, is whether one cent per pound or five cents per pound was the duty

legally applicable to this article. The earlier statute upon this subject imposed a duty upon chicory, ground, burnt, or prepared, five cents per pound. A subsequent statute, passed in 1872, imposed a duty on
18 chicory-root, ground, or unground. The term "root," perhaps so far as this case is concerned, is not of any importance. The collector thought that this article was burnt or prepared chicory; the importer deemed that it came under the term ground chicory. Here were two statutes as they stood after the amendment or after the alteration; chicory burnt or prepared and chicory-root, ground or unground. Now, the presumption of law is, from the reading of these two statutes, that there were two articles, one chicory burnt or prepared, and another article chicory ground.

We find from the testimony (and it is conceded on all hands) that ground chicory is the same thing as burnt chicory; because, in order to constitute ground chicory it has to be burned or roasted before it is ground. So that the presumption of law to which I have alluded is not applicable so far as this burnt chicory is concerned, and it is agreed that if chicory is burnt and ground a duty of one cent per pound only is applicable. Now the plaintiff claims that the same facts which are
19 true in regard to burnt chicory are also true in regard to prepared chicory, and that ground chicory is the same thing as prepared chicory. If ground chicory and prepared chicory are one and the same article, and ground chicory necessarily means prepared chicory, the duty assessed under the subsequent statute, in point of time, is the duty which is applicable to this case. Then it brings this question of fact before you: Is ground chicory the same article as prepared chicory, or, to state it in another form, is prepared chicory a different thing from ground chicory; and when the statute speaks of prepared chicory, is prepared chicory an article which has had another and an additional manipulation or process given to it so that it makes the thing a different thing from ground chicory?

The theory of the plaintiff which he has supported by testimony is this, that the chicory-root passing over the first stages of the process is roasted or burnt, and it is then ground; that the coarser portions of the article are exported, or are used in barrels; that the finer por-
20 tions of the article are placed for the convenience of commerce and trade in paper receptacles for the convenience of the retail trade; but the coarser portions placed in barrels and the finer portions placed in paper receptacles alike draw moisture from the air; because, they say that this article after it has been roasted and ground is drier than the atmosphere in its ordinary condition; that the coarser portions absorb moisture and in time become dry, and caked, and hard; that the finer portions placed in paper packages also absorb moisture, and that the more comminuted the article the finer it is—the more readily it absorbs and retains moisture, whereas the coarse particles would naturally not absorb the moisture as readily as the fine powder which is placed in the paper packages. And so they say that the ground chicory is the same thing—that ground chicory includes granulated chicory, includes paper chicory, includes every kind of chicory, and that there is no additional process added to the article or worked upon the article really after it is ground, except the process of absorption
21 of moisture from the atmosphere, which happens alike from the very necessity of the case both to the coarse ground and to the fine ground.

This is substantially the position of the plaintiff. On the other hand, the defendant says that the granulated chicory is one thing, and that

the fine chicory which is used by consumers, sold by retailers, is subject to an additional process after grinding, that it is placed in rooms where moisture is introduced by artificial means, and that this introduction of moisture by artificial means or by the natural means produced by exposing it to the air causes the article to become an additional and new preparation over and beyond the grinding.

Now, gentlemen, you have these two theories, each of them supported by testimony. You must determine which in your opinion is the theory which is substantially true. It is true that ordinarily the government must make out its case by a preponderance of proofs. In this case the presumption is, from the language of the statutes, that the articles are distinct, and it is for the plaintiffs to overcome that presumption
22 by a preponderance of proof upon their part.

The defendant's counsel thereupon renewed his exceptions to the refusal of the court to direct a verdict for the defendant, and to the submission of the case to the jury as involving any issue of fact for the jury to pass upon.

Defendant's counsel also excepted to those portions of the charge which pointed out that ground chicory and burnt chicory were one and the same thing, because it has to be burnt or roasted before it is ground, and to that part following which states that "it is agreed that if chicory is burnt and ground a duty of one per cent. per pound only is applicable."

The defendant's counsel also excepted to that part of the charge which stated that it was a question of fact instead of a question of law whether prepared chicory was a different thing from ground chicory.

The defendant's counsel also excepted to that part of the charge which indicated that plaintiff had supported by testimony his theory as stated in the charge, viz, that ground chicory and prepared chicory are the same article.

23 The defendant thereupon requested the court to charge the jury:

1st. That there being special provisions in the tariff for chicory-root ground, and chicory-root burnt, the provision for chicory-root prepared can only relate to such root when further prepared or advanced in manufacture than by the process of burning and grinding.

The court declined so to charge or otherwise than it had charged, and the defendant's counsel duly excepted.

The defendant's counsel also requested the court to charge:

2nd. That chicory root prepared covers all the chicory subjected to any further process of manufacture or preparation aside from the combined process of burning and grinding.

The court declined so to charge, and defendant's counsel duly excepted.

The defendant further requested the court to charge that the circumstance, as it appeared in evidence by the testimony of some of the witnesses, that the "paper chicory" had different traits as to taste, smell, &c., from granulated chicory, is a circumstance that the jury will
24 take into consideration; thereupon the court said: "That is true; but the real point for the jury to determine is whether ground chicory means chicory in all its stages of preparation; that is the simple question."

The defendant's counsel further excepted to the ruling of the court that the claim by the plaintiffs that chicory ground means the same thing as chicory prepared was supported by testimony, and to that part of the charge upon that topic, and concluding with the sentences:

"Now, gentlemen, you have heard these two theories, each of them supported by testimony. You must determine which is substantially true."

Thereafter the jury returned into the court, having requested to be shown the invoices in the case, and the defendant's counsel objecting to the invoices being sent to the jury as all of the matters in said papers were not in evidence, whereupon said invoice, or so much thereof as was produced in evidence, was shown by the judge to the jury, the statutes were read, and in response to questions from a juror the question of fact which had been previously submitted was stated,
25 and the substance of the charge was recapitulated.

The jury thereupon retired, and immediately thereafter returned into court and rendered a verdict for the sum of 619 dollars 80 cents in coin, and $71.43, its interest, in currency.

And inasmuch as the said several exceptions so offered and made to the opinion, instructions, and decisions of the court as above stated do not appear on the record of the said trial, thereafter, and on the prayer of the said defendant, by his counsel, the said judge has signed the foregoing as and for the bill of exceptions in this case, at the said October term, 1875, of said court, as aforesaid, and as and for the said 14th day of January, 1876, at said term, and caused the same to be filed nunc pro tunc.

[L. S.] N. SHIPMAN, *Judge.*

26 (Indorsed:) U. S. circuit court, southern district of New York. Emil Herold versus Chester A. Arthur. Copy bill of exceptions. George Bliss, United States attorney for the southern district of New York. Filed Oct. 5th, 1876.

27 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and seventy-six.

CHESTER A. ARTHUR, PLAINTIFF IN ERROR,
ag'st
EMIL HEROLD, DEFENDANT IN ERROR.

Afterwards, to wit, on the third Monday in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Charles A. Arthur, by Geo. Bliss, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid there is error in the several rulings of the court, to which exception has been taken, and that by the record aforesaid it appears that judgment aforesaid, in form aforesaid given, was given for the said defendant against the said plaintiff, whereas by law of the land the said judgment ought to have been given for the said plaintiff in error against
28 the said defendant in error, and the said plaintiff prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held for nothing; and that he, the plaintiff, may be restored to those things which he has lost by reason of said judgment.

GEO. BLISS,
U. S. Att'y. for Pl'tf in Error.

(Endorsement:) U. S. Supreme Court, southern district of New York. Chester A. Arthur, pl'tiff in error, versus Emil Herold, def't in error. Assignment of error. George Bliss, United States attorney for the southern district of New York. Filed Nov. 1, 1876.

29 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

John Lenehan, being duly sworn, says that on the 16 day of October, 1876, he served the within citation on Stanley, Brown & Clarke, esqs., defendant's attorneys, by leaving a copy thereof with the person in charge of the law office of said S., B. & C., attorneys, No. 16 Wall street, in said city.

JOHN LENEHAN.

Sworn to before me this 16 day of Oct., 1876.

J. H. FITCH,
Notary Public.

30 UNITED STATES OF AMERICA, *ss:*

To Emil Herold, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of October term, eighteen hundred and seventy-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Chester A. Arthur is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

ALEX. S. JOHNSON, *Cir. J.*

(Indorsed:) U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Emil Herold, defendant in error. Citation.

Due & timely service of a copy of the within citation is hereby admitted.

Filed Oct. 17, 1876.

31 Supreme Court of the United States.

CHESTER A. ARTHUR, PL'FF IN ERROR,
vs.
EMIL HEROLD, DEF'T IN ERROR.

And afterwards, to wit, on the third Monday of October, in October term, in the year of our Lord one thousand eight hundred and seventy-six, the said Emil Herold, by Stanley, Brown & Clarke, his attorneys, freely comes here into court, and says that there is no error, either in the record proceedings aforesaid, or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error,

and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STANLEY, BROWN & CLARKE,
Att'ys for Def't in Error.

STEPHEN G. CLARKE,
Of Counsel for Def't in Error.

(Indorsed:) No. 919. U. S. Supreme Ct. Chester A. Arthur, pl'ff in error, vs. Emil Herold, def't in error. Joinder in error. Stanley, Brown & Clarke, att'ys for def't in error, 16 Wall st., N. Y. Filed 21 November, 1876.

(Indorsement on cover:) No. 302. Chester A. Arthur, collector of the port of New York, plaintiff in error, vs. Emil Herold. S. New York C. C. U. S. Filed 7th November, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

CHESTER A. ARTHUR, COLLECTOR, &c.,
v.
EMIL HEROLD. } No. 77.

ERROR TO CIRCUIT COURT SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFF'S BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

CHESTER A. ARTHUR, COLLECTOR, &C.,
v.
EMIL HEROLD. } No. 77.

ERROR TO CIRCUIT COURT SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFF'S BRIEF.

STATEMENT.

The question raised here is as to the correct duty upon importations by the plaintiffs from a foreign port into the port of New York, in the year 1873, of certain merchandise upon which a duty had been assessed by the defendant as collector of the port of New York, at the rate of five cents per pound under section 11 of the act of Congress entitled "An act to increase the duty on imports, and for other purposes," approved January 30, 1864, which provides a duty "on chicory-root, four cents per pound; ground, burnt, or prepared, five cents per pound"; and upon the ascertainment and liquidation of said duties the plaintiffs duly protested and appealed to the Secretary of the Treasury, and brought

this action in due season, pursuant to the requirements of the statute in such case made and provided, claiming the said merchandise was dutiable only at the rate of one cent per pound by virtue of section 1 of the act of Congress entitled "An act to reduce the duties on imports and to reduce internal taxes, and for other purposes," approved June 6, 1872, which provides a duty in lieu of former duties "on chicory-root, ground or unground, one cent per pound."

The testimony which was offered by the plaintiff tended to show that the article in question was commercially known as "finely ground chicory, in papers," or "paper chicory," and was pulverized chicory; that chicory is grown extensively in Germany, where it is largely used as a substitute for coffee. The root, when dug from the ground, is first washed and scraped, then split and cut by machinery into pieces or sections, which are partially dried in the sun and then kiln-dried, in which latter condition it becomes an article of commerce to this country. Of this there are two forms, "light kiln-dried" and "extra kiln-dried," neither of which are burnt or roasted, except such as is necessarily incident to the process of kiln-drying.

The next process is burning or roasting, which is done in heated cylinders. It is necessarily roasted before it can be ground. Then it is ground in mills, from which it emerges in coarse and fine particles commingled, in which condition, or when simply burnt or roasted, it is not an article of commerce. The chicory is then passed through sieves, by which the coarse and fine particles are separated from each other. The coarse particles are packed in barrels or casks for shipment, and is called in trade "coarsely ground" or "granulated chicory";

the finer particles, after being again ground and reduced to powder, are packed in small paper bags, weighing ordinarily one-quarter of a pound each, sometimes half a pound, which are packed in casks. This kind is called "finely-ground chicory in papers" or "paper chicory." Both forms are drier than the atmosphere, and absorb moisture from it—the first more slowly than the second, because the particles are larger.

The casks or paper packages of "paper chicory" are placed in damp cellars or vaults attached to and a part of the large chicory manufactories, some of which are exclusively for the manufacture of paper chicory, in order to hasten the absorption of moisture, and in some factories the hastening of absorption is further facilitated by allowing steam to escape into the cellars. The greater quantity of moisture in finely-ground chicory over that which is absorbed in the "granulated" makes the paper chicory from 15 to 30 per cent. less per pound than the "granulated."

Paper chicory, when taken out of the cellars, has the consistency of paste, and hardens as it is exposed to the air. The granulated chicory also hardens by exposure.

The granulated chicory is usually sold by importers in this country to coffee-dealers and coffee-roasters to adulterate coffee; the paper chicory is sold exclusively to consumers, mostly Germans and Scandinavians in the Western States, who use it as a substitute for coffee.

The defendant introduced evidence to show that the natural absorption of moisture was hastened by artificial means, *i. g.*, by steam introduced through pipes in the vaults or cellars, and that this operation was an essen-

tial and usual process in the preparation of the paper chicory.

On the part of the plaintiff, evidence was offered that nothing had been done to the chicory in these vaults, except to allow the natural absorption of moisture to take place by exposing the paper chicory to the air. Some of the witnesses testified that paper chicory had different traits as to taste and smell from granulated chicory.

The plaintiff gave some evidence to show that a different article from the imported article called "patent chicory," or "chicory coffee," was made by an admixture of water and foreign ingredients. It was not claimed that the plaintiff's goods contained any admixture of foreign ingredients.

At the close of the testimony introduced by the plaintiff, when the plaintiff had rested his case, and also again at the close of all the testimony adduced, and when both sides had completed their evidence, the defendant moved that the court direct the jury to find a verdict for the defendant, which motion the court each time denied, and defendant's counsel duly excepted.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff in the year 1873 imported 42 casks of paper chicory into this market. Paper chicory is an article, a number of samples of which have been presented before you, which you have examined more carefully than I have, and which, therefore, it is unnecessary for me to describe.

The collector imposed a duty upon this article of five cents a pound. The plaintiff claims that a duty of one cent per pound only was applicable to this article under the then existing statutes, and having paid the extra duty which was demanded, has brought suit to recover from the collector the amount which he claims was ex-

acted contrary to law. The question, therefore, is whether one cent per pound or five cents per pound was the duty legally applicable to this article.

The earlier statute upon this subject imposed a duty upon chicory, ground, burnt, or prepared, five cents per pound.

A subsequent statute, passed in 1872, imposed a duty on chicory-root, ground or unground. The term "root," perhaps, so far as this case is concerned, is not of any importance.

The collector thought that this article was burnt or prepared chicory; the importer denied that it came under the term ground chicory. Here were two statutes, as they stood after the amendment, or after the alteration—chicory burnt or prepared, and chicory-root ground or unground.

Now, the presumption of law is, from the reading of these two statutes, that there were two articles, one, chicory burnt or prepared, and another article, chicory ground.

We find from the testimony (and it is conceded on all hands) that ground chicory is the same thing as burnt chicory, because, in order to constitute ground chicory, it has to be burnt or roasted before it is ground; so that the presumption of law to which I have alluded is not applicable, so far as this burnt chicory is concerned; and it is agreed that if chicory is burnt and ground, a duty of one cent per pound only is applicable.

Now, the plaintiff claims that the same facts which are true in regard to burnt chicory are also true in regard to prepared chicory, and that ground chicory is the same thing as prepared chicory. If ground chicory and prepared chicory are one and the same article, and ground chicory necessarily means prepared chicory, the duty assessed under the subsequent statute, in point of time, is the duty which is applicable to this case. Then it brings this question of fact before you: Is ground chicory the same article as prepared chicory? or, to state it in another form, is prepared chicory a different thing from ground chicory? and when the statute speaks of

prepared chicory, is prepared chicory an article which has had another and an additional manipulation or process given to it, so that it makes the thing a different thing from ground chicory?

The theory of the plaintiff, which he has supported by testimony, is this: that the chicory-root passing over the first stages of the process, is roasted or burnt, and it is then ground; that the coarser portions of the article are exported, or are used in barrels; that the finer portions of the article are placed for the convenience of commerce and trade in paper receptacles for the convenience of the retail trade; but the coarser portions placed in barrels and the finer portions placed in paper receptacles alike draw moisture from the air, because they say that this article after it has been roasted and ground is drier than the atmosphere in its ordinary condition; that the coarser portions absorb moisture and in time become dry and caked and hard; that the finer portions placed in paper packages also absorb moisture as readily as the fine powder which is placed in the paper packages; and so they say that the ground chicory is the same thing—that ground chicory includes granulated chicory, includes paper chicory, includes every kind of chicory, and that there is no additional process added to the article or worked upon the article really after it is ground, except the process of absorption of moisture from the atmosphere, which happens alike, from the very necessity of the case, both to the coarse-ground and to the fine ground.

This is substantially the position of the plaintiff.

On the other hand, the defendant says that the granulated chicory is one thing, and that the fine chicory which is used by consumers, sold by retailers, is subject to an additional process after grinding; that it is placed in rooms where moisture is introduced by artificial means, and that this introducion of moisture by artificial means, or by the natural means produced by exposing it to the air, causes the article to become an additional and new preparation, over and beyond the grinding.

Now, gentlemen, you have these two theories, each of

them supported by testimony. You must determine which in your opinion is the theory which is substantially true.

It is true that ordinarily the government must make out its case by a preponderance of proof. In this case the presumption is, from the language of the statutes, that the articles are distinct, and it is for the plaintiffs to overcome that presumption by a preponderance of proof upon their part.

The defendant's counsel thereupon renewed his exceptions to the refusal of the court to direct a verdict for the defendant, and to the submission of the case to the jury as involving any issue of fact for the jury to pass upon.

Defendant's counsel also excepted to those portions of the charge which pointed out that ground chicory and burnt chicory were one and the same thing, because it has to be burnt or roasted before it is ground, and to that part following which states that "it is agreed that if chicory is burnt and ground a duty of one cent. per pound only is applicable." The defendant's counsel also excepted to that part of the charge which stated that it was a question of fact instead of a question of law whether prepared chicory was a different thing from ground chicory.

The defendant's counsel also excepted to that part of the charge which indicated that plaintiff had supported by testimony his theory as stated in the charge, viz, that ground chicory and prepared chicory are the same article.

The defendant thereupon requested the court to charge the jury:

1. That, there being special provisions in the tariff for chicory-root ground and chicory-root burnt, the provision for chicory-root prepared can only relate to such

root when further prepared or advanced in manufacture than by the process of burning and grinding.

The court declined so to charge, or otherwise than it had charged, and the defendant's counsel duly excepted.

The defendant's counsel also requested the court to charge:

2. That chicory-root prepared covers all the chicory subjected to any further process of manufacture or preparation aside from the combined process of burning and grinding.

The court declined so to charge, and defendant's counsel duly excepted.

The defendant further requested the court to charge that the circumstance, as it appeared in evidence by the testimony of some of the witnesses, that the "paper chicory" had different traits as to taste, smell, &c., from granulated chicory, is a circumstance that the jury will take into consideration; thereupon the court said: "That is true; but the real point for the jury to determine is whether ground chicory means chicory in all its stages of preparation; that is the simple question."

The defendant's counsel further excepted to the ruling of the court that the claim by the plaintiff that chicory ground means the same thing as chicory prepared was supported by testimony, and to that part of the charge upon that topic, and concluding with the sentences, "Now, gentlemen, you have heard these two theories, each of them supported by testimony. You must determine which is substantially true."

Thereafter the jury returned into the court, having requested to be shown the invoices in the case, and the defendant's counsel objected to the invoices being sent

to the jury, as all of the matters in said papers were not in evidence.

Whereupon said invoice, or so much thereof as was produced in evidence, was shown by the judge to the jury, the statutes were read, and in response to questions from a juror the question of fact which had been previously submitted was stated, and the substance of the charge was recapitulated.

The jury thereupon retired, and immediately thereafter returned into court and rendered a verdict for the sum of $619.80 in coin, and $71.43, its interest, in currency. (Record, 5 to 9.)

Upon this verdict judgment was entered against the collector. (Record, 4.)

ASSIGNMENT OF ERRORS.

The court erred in refusing to direct a verdict for the defendant; in submitting the cause to a jury; in stating to the jury that ground chicory and burnt chicory were the same thing; in ruling it to be a question of fact, and not of law, whether prepared chicory differed from ground chicory; in refusing to give the above printed instructions requested by the defendant; and in the qualification or comment made upon or added to the request to which the judge assented; in the assumption that the plaintiff's claim of identity in "chicory ground" with "chicory prepared" was sustained by evidence; and in the above quoted charge upon that topic, concluding with the words, "Now, gentlemen, you have heard these two theories, each of them supported by testimony," &c.

BRIEF.

I.

It is to be observed that the act of June 30, 1864, c. 171, §10, places a duty of *four* cents a pound upon chicory-root; and five cents if it is *either* ground, burnt, or prepared. (13 Stats., 212, quoted literally at the commencement of the statement of the case, *ante*, and below.)

In this connection it may be worth while to direct attention to several antecedent and subsequent clauses of that section, viz:

"On opium, $2.50 per pound; on opium prepared for smoking, and the extract of opium, one hundred per cent. ad valorem. * * *

"On brimstone, crude, $6 per ton; on brimstone rolled or refined, $10 per ton.

"On castor beans or seeds per bushel of 50 pounds, 60 cents.

"*On chicory-root, four cents per pound; ground, burnt, or prepared, five cents per pound.*

"On cassia, 20 cents per pound; on cassia-buds and *ground* cassia, 25 cents per pound." (13 Stats., 212.)

In the act of June 6, 1872, c. 315, § 1, are found these provisions:

"On all skins for morocco, tanned but unfinished, 10 per centum ad valorem.

"*On chicory-root, ground or unground, one cent per pound.*

"On all timber, squared or sided, not otherwise provided for, one cent per cubic foot; on sawed boards," &c. (17 Stats., 231, top.)

The contention of the government is that chicory, which, after being ground, is further "prepared" for consumption as was this "paper chicory" in suit, is dutiable at the old rate of five cents per pound.

The kiln-dried, unroasted, unground chicory is an article of commerce. (Record, 5, near bottom.) When it is said, a few lines lower down that page (5), that as it emerges from the mills, in commingled coarse and fine particles, or when simply burnt or roasted, it is not an article of commerce, it cannot mean that it is not *susceptible* of being dealt in and transported, but that it is not *customarily* imported in that stage of manufacture. As it is imported at earlier and later stages, it *might* be brought here in that shape, and Congress has to provide for the introduction of articles that may be brought into the country, as well as for those which have been so dealt with.

The paper chicory in question had been further manipulated after the root had first been ground. (Record, 6.) It was, therefore, "prepared" chicory, the duty upon which was not reduced by the act of June 6, 1872.

II.

It was erroneous to say that ground and burnt chicory are the same thing. (Record, 7, folio 18.)

It may be that chicory must be roasted in order to be ground, but it was, and is, capable of being imported after it is burnt, so as to be ground in this country. These two words indicated different stages of manufacture, and the word "prepared," a still further advance in the process. This instruction that "ground" and "burnt" were synonymous must have led the jury to suppose that "prepared" was simply another synonym.

It is useless to examine in this brief the several exceptions taken. They all rest upon the proposition that there are, *or may be*, three or four divisions of this article; that there are articles of chicory *capable* of being imported, viz, chicory unground, chicory burnt, chicory ground, and chicory prepared.

The facts being undisputed, the court should have applied the law thereto without submitting the cause to a jury.

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Supreme Court of the United States.

CHESTER A. ARTHUR, COLLECTOR, &c.,
Plaintiff in Error,

vs.

EMIL HEROLD,
Defendant in Error.

Brief for Defendant in Error.

The questions presented by this record arise in an action brought against a collector of customs for an alleged illegal exaction of a duty of five cents per pound upon certain chicory imported by the defendant in error, who claims that the duty should have been but one cent per pound under the provisions of the Act of June 6th, 1872, which provided, Section one, 17 Stat. at L. 230, in lieu of former duties, "On chicory root, ground or unground, one cent per pound."

The assessment by the collector at the rate of five cents per pound was under the Act of June 30, 1864, Section 11, 13 Stat. at L., 202, 212.

This statute provided a duty as follows: "On chicory root, four cents per pound; ground, burnt or prepared, five cents per pound."

The importations in question were made in the year 1873 (Record, page 5.)

The record discloses exceptions on the part of the plaintiff in error, to the refusal of the court below to direct a verdict in

his favor (Record, fol. 15), and also sundry exceptions to the charge of the court as given (fol. 22), and to refusals to charge specific requests (fols. 23, 24).

The bill of exceptions shows the importations in question to have been of an article commercially known as "finely ground chicory, in papers," or "paper chicory," and was, in fact, pulverized or finely ground chicory (fol. 13). At fols. 14 to 17 will be found details of the processes of curing and fitting chicory for market.

POINTS.

I.

Upon the undisputed evidence that these importations consisted of ground chicory, the rate of duty claimed by the importer applied. In other words, the Act of 1872 covered the whole subject of chicory and repealed all prior acts. This statute provides that "On and after the first day of August, 1872, *in lieu* of the duties heretofore imposed by law on the articles hereinafter enumerated, etc.," and among the enumerations we find "chicory-root, ground or unground, one cent per pound."

United States *vs.* Claflin, 97 U. S., 546.
Washington Mills *vs.* Russell, 1 Holmes, 245.

The Act of 1864 placed chicory in two classes; the simple root, as it is dug from the earth, and the same root when "ground, burnt or prepared," using the three terms as substantially synonymous.

The use of two or more terms for the same article, connected by "or," is not unusual in tariff acts, and has been recognized by this court.

Arthur *vs.* Cumming, 91 U. S., 362, 364.

The following from title 33 of the Revised Statutes are the illustrations from the tariff of the use of convertible terms referred to in the above case:

Sail duck or canvas for sails, schedule E, page 466.
Argentine, Alabatta or German silver, schedule E, page 470.

Indian corn or maize, preserved or condensed milk, schedule F, 471.
Bay rum or bay water, schedule M, 477.
Slack coal or culm, *Ib.*, 478.
Fusel oil or amylic alcohol, *Ib.*, 479.
Gum substitute or burnt starch, *Ib.*, 480.
Linseed or flaxseed, *Ib.*, 481.
Vitriol, white or sulphate of zinc, *Ib.*, 485.
Balsam, fir or Canada, *Ib.*, 486.
Cocoa or cacao.
Conium cicuta or hemlock.
Cow or kine pox or vaccine virus.
Diamond dust or vort.
Esparto or Spanish grass, *Ib.*, 488.
Istle or tampico fibre, *Ib.*, 489.
Plaster of Paris or sulphate of lime, *Ib.*, 491.
Squills or silla, *Ib.*, 492.

Many more might be gathered from earlier acts. Compare with *McCulloch's* and *McElrath's Commercial Dictionaries.*

So in the Act of August 5, 1861, section 1, we find the term "prepared" used as synonymous with "manufactured" in the phrase "cocoa prepared or manufactured."

The earliest reference in the statutes to chicory by name which I have found, is in the Act of August 5, 1861, section 1, 12 Stat. at L., 292. The provision is for "chicory root" one cent per pound, "chicory ground" two cents per pound. The Act of July 14, 1862, section 8, 12 Stat. at L., 543, 551, increased these duties—"chicory root" two cents, "chicory ground, burnt or prepared" three cents.

The Act of 1864 still further increased the duty to four and five cents per pound, using the same terms of classification. The law remained in this condition until the Act of 1872 was passed; this act, professedly an act to reduce duties, returned to the earlier form of phraseology and put all chicory root, whether crude, as it comes from the earth, or prepared by burning and grinding, at one rate of duty.

In this connection, that the words burnt chicory, ground chicory or prepared chicory refer to one and the same article, I call attention to the mercantile testimony.

The dried root is an article of commerce and so is the burnt root after it has been prepared by grinding, but not otherwise. Said Mr. Justice Swayne in Arthur *vs.* Cumming, before cited: "Considering the juxtaposition and connection in which the two phrases are found, and letting in upon them the light of the mercantile evidence, the inference is clear that Congress used them, and intended that they should be understood as convertible terms.' The application here of this principle relieves the case of all the exceptions taken upon the trial, for, as matter of judicial construction, the article in question was dutiable at one cent per pound and not otherwise.

II.

Assuming that by prepared chicory something different from ground chicory is intended by the statutes, then the question was properly submitted to the jury, and their finding that the article in question was ground chicory is conclusive.

Indeed, the court went further than to submit a question of commercial designation. The question of fact submitted was thus stated:

"Is ground chicory the same article as prepared chicory, or, to state it in another form, is prepared chicory a different thing from ground chicory; and when the statute speaks of prepared chicory, is prepared chicory an article which has had another and an additional manipulation or process given to it, so that it makes the thing a different thing from ground chicory?" (Record, fol. 19.)

Certainly, if the plaintiff did not object to such a test the defendant can not properly find fault. It was as favorable a submission for him as, on the facts could be made. There was, therefore, no error that the collector can complain of in the submission to the jury. Under no possible aspect of the case could the court, in view of the evidence, sustain the claim of the collector and hold as matter of law that the importations in question were prepared chicory. The view of the court below was, that presumptively there were two articles, ground chicory and prepared chicory, and, on the evidence,

submitted to the jury, under which head the article in question came. In finding for the plaintiff, the jury found the article in fact ground chicory.

The specific objections to the charge are equally frivolous.

The plaintiff below had introduced evidence tending to show that his importations were ground chicory; and we submit the court went to the very verge and obviated all questions raised by the exceptions in the concluding paragraph of the charge (fol. 22).

The two requests to charge were requests to the court to usurp the functions of the jury. The whole matter of the case had been covered by the charge as given; under that charge it was the province of the jury to find whether either of the propositions submitted, took the importations in question out of the category of ground chicory and into the category of prepared chicory.

III.

The judgment then should be affirmed.

1. The Act of 1872 was exhaustive on the subject of chicory.

2. Upon the undisputed evidence the article in question was ground chicory and so dutiable *eo nomine*.

3. There was no error in the submission, or in the charge of the court below, prejudicial to the plaintiff in error.

Regardless of commercial designation, the case was submitted to the jury upon the whole testimony, covering methods of production and manufacture of chicory in all its commercial forms; and it was left to them to find as a matter of fact whether or not the article was ground chicory or whether prepared chicory. Their finding was in favor of the claim of the importer, and is not reviewable here.

STEPHEN G. CLARKE,
Of Counsel for Defendant in Error.

United States Supreme Court.

CHESTER A. ARTHUR,
vs. } No. 77.
EMIL HEROLD.

ADDITIONAL BRIEF FOR DEFENDANT.

Since my brief in this case was printed I have received the brief of the plaintiff, and in view thereof desire to call attention to certain additional authorities.

"The question whether an imported article is or is not known in commerce by the word or term used in the act imposing the duty, is one of fact for the jury:"

Tyng *vs.*. Grinnell, 92 U. S., 467.
Compare, Lawrence *vs.* Allen, 7 How., 797.

So also, in Barney *vs.* Schmeider, 9 Wall., 248, the substance of the decision is, that it is a mixed question of law and fact, whether certain goods were similar to certain other goods described in the revenue laws for the purposes of customs duties; and cannot by the mere charge or direction of the judge, *where there is any conflict of testimony*, be wholly withdrawn from the jury.

See page 252.

"It has been repeatedly determined by this tribunal that no court is bound to give instructions in the forms and language in which they are asked. If those given sufficiently

cover the case, and are correct, the judgment will not be disturbed, whatever those may have been which were refused.

"We have examined the charge. * * * It submitted the case well and fairly to the jury, and was quite as favorable to the company, as it had a right to demand."

Swayne, J., Railway Co. *vs.* McCarthy, 96 U. S. 258, 265.

To the same point see also:

Continental Co. *vs.* Stead, 95 U. S., 161.
Woodruff *vs.* Hough, 91 U. S. 596.

"If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption because, in the language of Pollock, C. B. in, Girr *vs.* Scudds, 11 Ex. 191, 'a tax cannot be imposed without clear and express words for that purpose.'"

United States *vs.* Isham, 17 Wall, 496, 504.

STEPHEN G. CLARKE,
For Defendant.